April 17, 1998

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L97AC046**

WOODINVILLE WATER DISTRICT
Conditional Use Permit Appeal

Location: 17238 NE Woodinville-Duvall Road, Woodinville

Applicant: Woodinville Water District, *represented by*
Robert Bandarra, General Manager
PO Box 1390, Woodinville, WA 98072-1390
Telephone: (425) 483-9104/ext. 303 Facsimile: (425) 483-0327

Appellant: **Barbara Kelson,** PO Box 1343, Woodinville, WA 98072
Facsimile: c/o Tim Schriever (206) 485-1083

Department: Department of Development and Environmental Services
Land use Services Division, *represented by:*
Sherie Sabour, Site Plan Review Section
Telephone: (206)296-7112 Facsimile: (206) 296-7051

SUMMARY OF RECOMMENDATIONS AND DECISION:

Department's Preliminary:	Deny the appeal
Department's Final:	Deny the appeal
Examiner:	Grant the appeal

PRELIMINARY MATTERS:

Application submitted:	August 6, 1997
Notice of appeal received by Examiner:	January 5, 1998
Statement of appeal received by Examiner:	January 5, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	February 13, 1998
Hearing Opened:	March 31, 1998
Hearing Closed:	March 31, 1998

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Office of the King County Hearing Examiner.

ISSUES ADDRESSED:

-Conditional use
-Non-conforming use

FINDINGS, CONCLUSIONS AND DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. A complete application was received from the Woodinville Water District on September 2, 1997 for a conditional use permit to expand its existing utility office and yard complex located at 17238 NE Woodinville-Duvall Road. The 9.7-acre parcel lies north of the Woodinville-Duvall Road in an area zoned RA 5, with residentially developed RA 2.5 zoned properties lying to the west and northwest. The adjacent property to the east is currently undeveloped.

2. The District's proposal includes the construction of a 6,800 square foot new administration building near the parcel's southeast corner, the removal of an older barn near the property's western boundary and its replacement with a new 2,800 square foot inventory building, a minor addition to its existing operations building, and the conversion of its existing administration building into a meeting facility. The total floor area within the currently existing buildings is 19,694 square feet, with an expansion to 24,563 square feet of floor area proposed under the conditional use permit application. The environmental checklist and the site plan identify proposed parking facilities for 55 vehicles, an apparent increase of 25 stalls over the existing level.

   The District's need for expanded office facilities is amply supported by the record, both within its testimony and in site photographs. The District currently has 26 employees working out at the site, and its expansion is expected to accommodate five or six further imployees. However, the District's Comprehensive Plan predicts that its customer base will eventually more than double from present levels, which suggests the future possibility that the currently proposed expansion may also be outgrown.

3. The District provided its own SEPA review and issued a determination of non-significance on August 10, 1997. On December 15, 1997, the King County Department of Development and Environmental Services issued a conditional use permit to the Woodinville Water District approving the proposed facility expansion, subject to four conditions. Although the DDES decision notes that in 1968 when the Water District office use was established "the property was zoned G which did not permit water district offices", based on site history the Department

viewed the District proposal as a non-conforming use and concluded that it would "now be inappropriate for the County to require the use to be relocated".

4. A timely appeal of the conditional use permit was filed by Barbara Kelson, a neighbor who resides adjacent to the western property line of the District site. A pre-hearing conference was held by the King County Hearing Examiner's Office on February 13, 1998, which was attended by District Manager, Robert Bandarra, and project engineer, Kenneth Pick, as well as Ms. Kelson and her engineer, Tim Schriever. The Examiner noted that the December 12, 1997 conditional use decision from DDES raises an issue as to whether the existing utilization of the property qualifies as a legal non-conforming use. The pre-hearing order issued February 18, 1998, advised the applicant that "if such uses are indeed not legally established, then the conditional use permit application will require a review of the site as a proposed new location." The order further suggests that "if the District is not able to present a strong case in support of a finding that its existing uses are legally established, it may want to consider seeking a settlement with the Appellant which provides satisfactory impact mitigation in exchange for withdrawal of the appeal". The pre-hearing order also instructed DDES to provide to the parties and to the Examiner a complete historical record of county permitting activity on the property going back to its initial purchase by the District in the 60's in order that the issue of use legality would be adequately documented.

   In addition to framing the question of whether a legal non-conforming use exists on the District's property, the pre-hearing order also identified the compatibility issues raised by the Appellant which would be subject to review under the conditional use standards stated at KCC 21A.44.040. Finally, the order noted that Ms. Kelson's challenges to the SEPA determination and the sufficiency of the Applicant's supposed septic system were beyond the jurisdiction of the Hearing Examiner to consider within this proceeding.

5. Only about 4 acres of the 10-acre Water District site is intensively developed. Three buildings and supporting parking facilities are constructed in the southern portion of the parcel adjacent to Woodinville-Duvall Road, with the northern half of the developed segment comprising largely a paved work area featuring an open equipment garage and materials storage bins. The easternmost portion of the built area is erected upon fill imported onto the site long ago consisting of materials excavated when the Woodinville-Duvall Road was constructed. In addition, in 1990 when the operations building and open garage were constructed, it was necessary to overexcavate their foundations in order to remove incompetent fill and replace it with approved structural fill. Pursuant to the site grading plan, much of the old fill was deposited in the previously undeveloped area located on the northern half of the property.

6. As depicted in photographs taken by Ms. Kelson both in 1991 and more recently, it is apparent that large quantities of fill were deposited within onsite wetlands on the northern half of the District property. What is less clear is how much of this filling and grading occurred in 1990 and how much of it is recent activity. The photographs tend to suggest that most of the wetland filling probably occurred in 1990. Nonetheless, it is evident from the photographs and the testimony that filling and grading in this northern area continues to be an ongoing District activity conducted without grading permits. Since both the Applicant's engineer, Mr. Pick, and the Appellant's engineer, Mr. Shriever, agree that the current actively-worked stockpile of fill on the site is approximately 200 cubic yards, this activity needs to be regulated by a King County grading permit regardless of whether it is within the wetland and its buffer or entirely outside

such sensitive areas. This activity, however, is unrelated to the conditional use permit application under review; its remediation is a matter more properly taken up with DDES Code Enforcement officials.

7. As supplied by DDES staff, County records concerning Water District use of its property on the Woodinville-Duvall Road go back to September, 1968, when a Mr. Bannecker wrote the County Planning Department on behalf of the District inquiring whether its newly acquired parcel could be used for storage of Water District equipment and supplies. In October, Edward Sand, the County Planning Director, replied by letter, opining that the G-zoning on the property permitted its use for "public utilities facilities" and that the proposed storage would be allowed. A follow-up letter on November 13, 1968, from Richard Reed, attorney for the District, raised the question whether the permitted use of the parcel might be expanded to include "an office, warehouse and storage yard", noting that the property currently had a small residence and a barn on it which the District planned to convert. On December 20, 1968, Mr. Sand provided Mr. Reed with a brief written response to his inquiry that referred the expanded use question back to his October letter to Mr. Bannecker, implying that a satisfactory response had been previously given.

8. Our reading of Mr. Sand's December 20, 1968, letter is that it simply evaded Mr. Reed's question, but the District chose to regard it as conferring the County's blessing on their plans. Having converted the existing house and barn on the property into office and storage facilities, ten years later in 1979 the District applied for a conditional use permit (File No. 79-62-C) to expand the office building from 1,350 to 4,150 square feet. The Zoning Adjuster's decision issued November 9, 1979, reviewed the history of the District's use of the property, stating that in 1968 "the property was zoned G (as it is now), which does not permit water district offices", but that "the Planning Department by letter advised the District that the property could be used for a water district office". Citing the District's reliance on the Planning Department's determination and its good faith development of the property, the Adjustor approved the conditional use permit on the basis that "expansion of the facility is necessary, so that the District can fulfill its responsibilities as a public utility..."

9. Another ten years passed and the Water District again found itself outgrowing its facilities. As a consequence, in 1989 it again came in with a conditional use permit application to enlarge its operations. This time the expansion was major, involving consttruction of a new 5,400 square foot maintenance building, a 5,250 vehicle storage building, a 1,000 square foot fuel and wash facility, an 800 square foot storage pad for earth materials, and the installation of two 3,000 gallon underground storage tanks. Parking facilities were proposed to be expanded to 27 stalls, and a 20-foot wide strip of Type 1 landscaping was to be installed along both the west and the east property lines to create visual screening from adjoining properties.

   Although its description of the existing facilities as including a 7,200 square foot office building appears to be a misstatement, the Building and Land Development Division staff report for the conditional use permit hearing indicates that during the previous ten years the use of the property had expanded to include the use of the barn as a maintenance shop and areas north of the barn as a work yard. Although the BALD Report observes that "the size and design of the proposed new buildings is not similar to the surrounding rural residential developments", it suggests that the in the context of the overall size of the property the proposed landscaping and setbacks would reduce possible negative visual impacts to an acceptable level.

10. The Zoning Adjustor's rather perfunctory March 2, 1990, decision for the File No. 89-69-C conditional use permit application noted that there was no opposition expressed to the District's request and found that "the District representative said that the proposal is in conformance with the zoning requirements". The Adjustor concluded that "the proposal is an expansion of a utility district facility which has been granted a conditional use permit for the existing facility" and was capable of being conditioned to meet conditional use criteria.

11. Although the barn was never removed nor the underground fuel tanks installed as proposed in 1989, the remaining facilities were constructed as approved by the conditional use permit. The Appellant contends, and the record generally supports, the conclusion that the 1990 expansion of the District facilities has had adverse impacts on off-site residential properties. To begin with, as acknowledged by the Applicant's architect, the Type 1 landscaping required under the 1990 permit has not provided effective visual screening along the property's western boundary. There are a number of reasons for this. First, the evergreen plantings have not grown successfully adjacent to the northerly portions of the District yard where they are shaded by a small grove of deciduous trees. Second, there is an approximately 30-foot break in the visual screen because no trees were planted on top of the District septic drain field. Third and most critically, there is about a ten foot drop from the Kelson property on the west down to the flat graded yard on the District site, which means that any trees planted along the property line for screening purposes would need to reach a height of nearly 25 feet to have any significant beneficial effect. The Kelson residence, which has a territorial view east to the Cascades, sits on a grassy knoll overlooking over the District yard with an unobstructed view of its open equipment garage through the gap in the landscaping screen, plus a view of the galvanized metal barn slightly to the north that is only partially screened by existing plantings. Ms. Kelson's real estate agent testified that two years ago she lost a sale of the property because the potential purchaser was not prepared to live with the view of the District yard as a primary visual amenity.

12. In addition, since 1990 there has been an increase in other off-site impacts from District activities. These include noise impacts from the operation of District trucks and earth moving machinery, not only during normal work hours but in the early morning and on some evenings and weekends, the use of amplified equipment for inter-yard communications, and outside lighting which in some instances has been redirected upward to shine toward the western property boundary.

13. The Appellant's engineer, Mr. Shriever, also alleged that the traffic impacts of the proposal have not been properly identified and evaluated. Since no traffic study has yet been performed for this project, it is difficult to evaluate these issues. Mr. Shriever contends that standard ITE trip generation tables for the types of uses proposed suggest that the site expansion might generate close to 1,000 vehicle trips per day. The District, on the other hand, predicts an ADT of approximately 200 trips. Even more confusing is a letter from the County Transportation Planning Division dated June 20, 1997, purporting to exempt the District application from transportation concurrency requirements based on its having impacts falling below SEPA thresholds. What is curious about this letter is that the square footage and parking stall figures recited therein bear no obvious relationship to the District's application. Finally, Mr. Shriever questions the propriety under the King County Road Standards of allowing the District to maintain two driveways onto a principal arterial. He suggests that normal practice, based on overall vehicle volumes and heavy equipment and truck use, would require driveway consolidation into a single road access intersection. While Mr. Shriever's analysis appears to be

consistent with Road Standards policies, we note that these kinds of determinations are ultimately ones of engineering judgment.

14. Mr. Shriever also argues that the quantity of impervious surface coverage proposed by the Applicant both violates RA-5-zone standards and is incompatible with surrounding residential uses. While it is true that the proposal will exceed the basic RA-5 standard of 20 per cent maximum impervious coverage by about 38,000 square feet, KCC 21A.12.220.A allows non-residential uses in the RA zone to contain a maximum of 40 per cent impervious surfaces. Nonetheless, the concentration of buildings and impervious surfaces along the District's frontage on the Woodinville-Duvall Road creates an appearance which is in conflict with the residential nature of the area and constitutes a precedent which encourages further introduction of non-residential uses.

15. The new uses being proposed by the Water District, while they will add a large new building to the complex of structures located on the southern end of the property, would also provide some visual benefits over the existing condition. The one story height of the new building would maintain a residential scale, and the largely wooden facade would tend to soften its commercial character. In addition, remodeling the existing building to provide it with a gabled roof would lessen its commercial appearance. Of particular concern to Ms. Kelson, replacing the galvanized metal barn currently near the western site boundary with a new inventory building probably would also be a visual upgrade. Nonetheless, the proposal would increase the intensity of structural development on the property, including an expansion of areas devoted to parking and a net increase in impervious surfaces.

16. With respect to the requirements to KCC 21A.08.060 governing the approval of new locations for public utility offices, the uncontested evidence of the Appellant was that there is approximately one square mile of commercially-zoned property within the City of Woodinville lying generally along the east side of State Route 522 and the Sammamish River. The Appellant also introduced photographs and real estate data indicating that at least some of these properties are for sale.

CONCLUSIONS.

1. In 1968, allowable uses on the Woodinville Water District parcel were governed by the 1963 King County Zoning Code. Under its provisions, within the G-zone Agricultural district uses were permitted so long as they were sited on 10-acre lots. KCC 24.22.020(10) permitted within the A-zone "public utility facilities such as telephone exchanges, sewage or water pumping station, electrical distribution substations, water storage reservoirs or tanks necessary for the distribution and transmission of services for the area including accessory microwave transmission facilities and towers". Our reading of this provision is that the defining characteristic of a public utility facility is that it is "necessary for the distribution and transmission of services of the area". This classification focuses on passive uses involving the delivery of necessary services and is different in nature from a category which includes more active, labor-intensive support activities such as utility offices and maintenance yards. Applying the above-cited definition, establishment of either a public utility office or maintenance yard would not have been a permitted use in 1968 under the 1963 Zoning Code.

2. Moreover, over the history of this site no County administrator has ever taken a contrary

position. Mr. Sand, in his initial letter to the District in 1968, only gave his blessing to use of the District parcel for material storage, a passive activity. His second letter in response to the question from the District's attorney regarding office and warehouse uses was simply an evasion. Reference to the 1968 regulations occurs both within the Zoning Adjustor's report for the 1979 conditional use and variance applications and, most recently, in the DDES conditional use permit decision issued in December, 1997. In both instances, the 1998 establishment of the District office was described as a use which was not permitted under the 1963 code.

3. The real question presented by the Woodinville Water District application is not, therefore, whether the office and yard currently existing on the District's property were legal uses at the time they were established. Clearly, they were not. Rather, the question now is whether a 30-year history of administrative tolerance of these unlawful activities has somehow transformed them into legal non-conforming uses. This is essentially the position argued by both the Applicant and DDES staff.

4. Unfortunately, Washington case law is very clear in holding that official administrative tolerance of an illegal activity cannot convert such activity into a legal non-conforming use. The leading case on this subject is Anderson v. Island County, 81 Wa 2nd 312 (1972), which answered this question in the following manner:

> "The board's actions in condoning or specifically authorizing continuance of the alleged but in fact spurious non-conforming use, either by (1) an erroneous classification as a non-conforming use, or (2) a permanent extension of this undesirable use through a zoning reclassification of the property, was inappropriate. As operation of the batching plant itself was a violation of the interim zoning ordinance, the board of commissioners clearly abused its discretion in perpetuating the inconsistent use of the tract of land in question." (81 Wn 2nd at 322, 323).

5. Moreover, Washington case law also views the fact that a mayor of a city purported to authorize a non-conforming use as not giving rise to an estoppel against the city's later attempts to prohibit such use. This holding was required because the mayor possessed no legislative authority to amend the zoning code, and therefore his attempt to endow the offending use with a status of legality was ultra vires and void. Choi v. Fife, 60 Wn App 458, at 464 and 465 (1991). Similarly, the fact that a municipality has knowingly tolerated an illegal use or issued building permits in furtherance thereof do not have the effect of estopping the municipality from denying its illegal character. See Mercer Island v. Steinmann 9 Wn App 479, 483 (1973).

   As these cases demonstrate, it is a well established principle of Washington law that administrators lack the governmental authority necessary to convert an unlawful use into a lawful one, no matter in what form their tolerance is expressed or rationalized. As for an estoppel claim, while there may be an estoppel argument against a County attempt to abate existing District uses, that is not the circumstance before us. No question of abatement is raised by this proceeding, only the issue of further expansion. There is no legal authority whatever for the proposition that the County is estopped from denying an application to expand an illegal use.

6. Because the existing facilities and activities on the Water District site do not qualify as legally established non-conforming uses, their further expansion under authority of a new conditional use permit can only be approved if they legally qualify under current zoning regulations for

establishment of a new utility office and yard location. KCC 21A.08.060 authorizes approval of new utility office locations within the RA zone "only if there is no commercial/industrial zoning in the utility district", and utility yards are only permitted within the RA zone as an accessory to district offices. It is uncontested that the Woodinville Water District service area contains commercial/industrial zoning, necessitating a conclusion that the District site does not quality as a new utility office location. Therefore, the conditional use permit must be denied.

7. Even though not a legally established use, expansion of the Water District facility was tolerated in past years because there was no neighborhood opposition to it. Until 1990, the District operation was relatively small and non-impactive. The growth in district facilities which has occurred since 1990, however, has taken it to a new stage where truck and heavy equipment noise, hours of operation, lighting impacts, and its visual character adversely affect neighboring residential properties, especially those at higher elevations which look down upon the office and yard complex. In view of these impacts, it is questionable whether further expansion of the District site would be in the public interest, even if existing activities had qualified as a legal non-conforming use.

8. In light of obvious defects in its legal posture, it is surprising that the District did not heed the Examiner's advice and seek to reach a settlement with the Appellant. This might have allowed an increase in the Applicant's facilities in exchange for more rigorous attention to controlling off-site impacts. If such an agreement had been reached with Ms. Kelson, a withdrawal of her appeal would have left the DDES administrative conditional use decision intact, notwithstanding its inadequate legal foundation. As it is, our decision merely preserves the status quo, an outcome which neither the Applicant nor the Appellant are likely to relish.

DECISION:

The appeal is GRANTED. The conditional use permit decision issued by DDES on December 15, 1997, is reversed, and the conditional use permit is denied.

ORDERED this 17th day of April, 1998.

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Stafford L. Smith, Deputy
King County Hearing Examiner

TRANSMITTED this 17th day of April, 1998, to the parties and interested persons on the attached list.

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding these appeals. The Examiner's decision shall be final and conclusive unless within twenty (20) days from the date of the decision an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the decision.

MINUTES OF THE MARCH 31, 1998, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L97AC046 – WOODINVILLE WATER DISTRICT:
Stafford L. Smith was the Hearing Examiner in this matter. Barbara Kelson/Appellant; Tim Schriever, Mike Ruark/Attorney for Woodinville Water District; Robert Bandarra/Woodinville Water District; Ken Pick/Woodinville Water District; Stephen Benisuik; Joseph Allen; Sydney Wills; Galen Page; and Sherie Sabour/DDES, participated in the hearing.

The following exhibits were offered and entered into the hearing record:

Exhibit No. 1	Department of Development and Environmental Services staff report, prepared for the March 31, 1998 public hearing of file no. L97AC046 – Woodinville Water District, with additional attachments submitted to Hearing Examiner on March 4, 1998 and on March 11, 1998
Exhibit No. 2	DDES Report and Decision, File No. L97AC046, dated December 15, 1997
Exhibit No. 3	Conditional Use Permit file
Exhibit No. 4	Appeal of CUP decision, received December 19, 1997
Exhibit No. 5	5 pages of photographs of Woodinville Water District buildings, labeled 5a-5b-5c-5d-5e
Exhibit No. 6	81 Kelson photographs taken from residence, showing various views (and blockage of views) of the Woodinville Water District buildings, grounds (natural and land-fill), and wetland areas taken over a period of years
Exhibit No. 7	Realty listing for commercial properties in area of WWD development, dated February 22, 1998
Exhibit No. 8	Description of proposed CUP
Exhibit No. 9	Table from Institute of Traffic Engineers manual
Exhibit No. 10	June 20, 1997 letter
Exhibit No. 11	Mr. Schriever's land use analysis dated March 17, 1998
Exhibit No. 12	City of Woodinville zoning code map showing commercial and industrial properties in area
Exhibit No. 13	Comment letter, dated March 30, 1998, from Nick & Tanya Soltys to Hearing Examiner
Exhibit No. 14	Comment letter, dated March 30, 1998, from Joseph R. Allen to DDES
Exhibit No. 15	Woodinville Water District plot plan
Exhibit No. 16	Woodinville Water District site plan
Exhibit No. 17	Woodinville Water District photos of site (keyed to exhibit no. 16)
Exhibit No. 18	Drawing OF WWD's proposed administration building
Exhibit No. 19	WWD architectural site plan
Exhibit No. 20	WWD landscape plan from 1990 building plan

SLS/cp/lc
Attachment
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